Alesiah bt Jumil & Anor v Julas bin Joenol

HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NO BKI-24–141/7 OF 2013
CHEW SOO HO J
15 NOVEMBER 2013

Civil Procedure — Originating summons — Declaration — Family law — Marriage — Declaration that defendant not natural and/or adopted father of infants — Prohibition of defendant from having any contact with plaintiff's upbringing of infants — Whether allegation that plaintiffs being biological parents of infants proven — Whether first plaintiff lawful wife of defendant — Whether plaintiff committed bigamy — Whether plaintiffs have rebutted or disproved presumption under s 112 of the Evidence Act 1950 on paternity of defendant

The plaintiffs were seeking, inter alia, for a declaration that the defendant was not the natural and/or adopted father of the infants named Finnea Alesiah Chua and Nuriel Chua; and an injunction that the defendant whether by himself, his servants or agents be restrained or prohibited from having any contact whatsoever and interfering with the plaintiff's upbringing of the two infants. The plaintiffs submitted that they were the biological parents of the two infants being proved by the DNA tests carried out and the result as in the copy of the DNA report. In opposing this application, the defendant submitted that the first plaintiff was his lawful wife vide their marriage solemnised according to 'Adat Istiadat Kampung' ('the first marriage'). Thus, the two infants were presumed to be the defendant's children as they were born during the subsistence of his marriage with the first plaintiff. Secondly, it was contended that the subsequent marriage between the first and the second plaintiff's pursuant to the Law Reform (Marriage and Divorce) Act 1976 ('the Act') ('the second marriage') in the subsistence of the defendant's said marriage with the first plaintiff, was null and void and that the plaintiffs have committed bigamy under s 7 of the Act. The issues that arose were whether the plaintiffs have now rebutted or disproved the presumption under s 112 of the Evidence Act 1950 ('the EA') on the paternity of the defendant as the natural and biological father of the two infants.

Held, allowing the application with costs of RM5,000:

(1) On the declaration sought that the defendant was not the adopted father of the two infants, this was a non-issue as there was no evidence of any adoption order made under the Adoption Ordinance 1960 being produced before the court (see para 3).

(2) The issue of paternity of the two infants was still a live issue if there was rebuttal evidence from the plaintiffs. Res judicata would not apply on this issue of paternity by estopping the plaintiffs from raising new, cogent and material evidence which will rebut the presumption under s 112 of the EA. This is particularly so when there was no DNA test performed earlier and no such DNA results were available in the earlier trial as to the truth of the paternity of the two infants (see para 5).

(3) In the light of the accuracy and certainty of a DNA test in the present era which had been universally recognised and accepted as conclusive evidence of its result in the test be it, inter alia, the paternity, motherhood or both or others. The court did not accede to the proposition that such DNA test and its result which has been universally recognised as accurate to the extent of achieving certainty though being a form of scientific means ought to be disallowed as evidence to rebut the presumption under s 112 of the EA. Today, DNA test is well accepted as to its accuracy. There was no valid reason to depart from this aspect of the science which gives an accurate result of 99.99% of certainty unless there was another report to the contrary. The DNA report which virtually ascertains the truth of the fact in issue ought to be accepted. If it can be established by this DNA test with that positive certainty of the biological parenthood of the two infants, it would not only have affirmed that the first defendant being a party to the first marriage might 'have no access to each other at any time when he (the Defendant) could have been begotten' but would also have provided affirmative and conclusive rebuttal evidence to the presumption that the two infants were the legitimate children of the defendant biologically (see para 6).

(4) There was no necessity to consider this contention/allegation of bigamy by the defendant at this stage and would leave it for determination when such allegation/contention becomes the issue relevant to the cause of action (see para 10).

[Bahasa Malaysia summary

Plaintif-plaintif memohon, antara lain, untuk perisytiharan bahawa defendan bukan bapa kandung dan/atau bapa angkat bayi-bayi yang bernama Finnea Alesiah Chua dan Nuriel Chua; dan injunksi bahawa defendan sama ada dengan dirinya sendiri, pembantunya atau ejen-ejennya dihalang atau dilarang daripada mempunyai apa-apa hubungan langsung dan campur tangan dengan asuhan plaintif terhadap kedua-dua bayi tersebut. Plaintif-plaintif berhujah bahawa mereka adalah ibu bapa kandung kedua-dua bayi tersebut dengan dibuktikan oleh ujian-ujian DNA yang dijalankan dan keputusan seperti dalam salinan laporan DNA. Dalam membantah permohonan ini, defendan berhujah bahawa plaintif pertama adalah isteri sahnya melalui perkahwinan yang dilangsungkan mengikut 'Adat Istiadat Kampung' ('perkahwinan pertama'). Maka, kedua-dua bayi dianggap anak-anak defendan kerana mereka

lahir semasa wujudnya akan perkahwinannya dengan plaintif pertama. Keduanya, ia dihujahkan bahawa perkahwinan selanjutnya antara plaintif pertama dan plaintif kedua berikutan Akta Memperbaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta') ('perkahwinan kedua') dalam kewujudan perkahwinan defendan dengan plaintif pertama, adalah tak sah dan batal dan bahawa plaintif-plaintif telah melakukan bigami di bawah s 7 Akta. Isu-isu yang berbangkit adalah sama ada plaintif-plaintif telah mematahkan atau membuktikan anggapan di bawah s 112 Akta Keterangan 1950 ('AK') atas paterniti defendan sebagai bapa kandungan kedua-dua bayi tersebut.

Diputuskan, membenarkan permohonan dengan kos sebanyak RM5,000:

(1) Atas perisytiharan yang dipohon bahawa defendan bukan bapa angkat kedua-dua bayi, ini bukanlah isu kerana tidak terdapat keterangan mengenai apa-apa perintah pengambilan anak angkat dibuat di bawah Adoption Ordinance 1960 dikemukakan di hadapan mahkamah (lihat perenggan 3).

(2) Isu paterniti kedua-dua bayi masih menjadi isu jika terdapat keterangan pematahan daripada plaintif-plaintif. Res judicata tidak akan diguna pakai atas isu paterniti dengan mengestop plaintif-plaintif daripada membangkitkan keterangan baru, nyata dan material yang akan mematahkan anggapan di bawah s 112 AK. Ini adalah kerana tidak terdapat ujian DNA yang dijalankan sebelumnya dan tiada keputusan DNA sedemikian terdapat dalam perbicaraan sebelumnya terhadap kebenaran mengenai paterniti kedua-dua bayi tersebut (lihat perenggan 5).

(3) Berdasarkan ketepatan dan kepastian ujian DNA dalam era sekarang yang diiktiraf secara sejagat dan diterima sebagai keterangan muktamad terhadap keputusannya dalam ujian sama ada, antara lain, paterniti, menjadi ibu atau kedua-duanya atau yang lain. Mahkamah tidak bersetuju kepada cadangan bahawa ujian DNA sedemikian dan keputusannya yang telah diiktiraf secara sejagat sebagai tepat sehingga mencapai kepastian walaupun dalam bentuk saintifik patut tidak dibenarkan sebagai keterangan untuk mematahkan anggapan di bawah s 112 AK. Pada masa kini, ujian DNA diterima baik terhadap ketepatannya. Tidak terdapat alasan sah untuk menyimpang daripada aspeks sains ini yang memberi keputusan tepat sebanyak 99.99% kepastian kecuali terdapat laporan lain yang menentang. Laporan DNA yang mana hampir-hampir menentukan kebenaran fakta dalam isu patut diterima. Jika ia dapat dibuktikan oleh ujian DNA ini dengan kepastian yang positif terhadap keibubapaan kandung kedua-dua bayi tersebut, ia bukan sahaja mengesahkan bahawa defendan pertama sebagai pihak kepada perkahwinan pertama mungkin 'have no access to each other at any time when he (the Defendant) could have been begotten' tetapi juga

memberikan keterangan pematahan yang sah dan muktamad kepada anggapan bahawa kedua-dua bayi tersebut adalah anak-anak sah kepada defendan (lihat perenggan 6).

(4) Tidak ada keperluan untuk mempertimbangkan hujahan/dakwaan bigami ini oleh defendan pada peringkat ini dan dibiarkan untuk penentuan apabila dakwaan/hujahan sedemikian menjadi isu relevan kepada sebab tindakan (lihat perenggan 10).]

Notes

For cases on declaration, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 6049–6053.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

Gautam Kundu v State of West Bengal and SM (1992) 2 CALLT 130 HC, HC (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281; [1995] 1 CLJ 609, CA (refd)

Legislation referred to

Adoption Ordinance 1960

Evidence Act 1950 ss 102, 103, 112

Indian Evidence Act 1872 [IND] s 112

Law Reform (Marriage and Divorce) Act 1976 s 7

Ariel Dasan (PJ Perira & Co) for the applicant/plaintiff.

Pontius Aludah (Anthony Chong & Co and Aludah & Co) for the respondent/defendant.

Chew Soo Ho J:

INTRODUCTION

[1] Vide this originating summons, the plaintiffs are seeking, inter alia, for a declaration that the defendant is not the natural and/or adopted father of the infants named Finnea Alesiah Chua (f) (Birth Certificate No 041125-12-1668) born on 25 November 2004 and Nuriel Chua (m) (Birth Certificate No 070105-12-0927) born on 5 January 2007 ('the two infants'), an injunction that the defendant whether by himself, his servants or agents be restrained or prohibited from having any contact whatsoever and interfering with the plaintiffs upbringing of the two infants abovenamed and costs.

[2] The principal ground and perhaps the sole ground in support of the plaintiffs' application is that the plaintiffs are the biological parents of the two infants being proved by the DNA tests carried out and the result as in the copy of the DNA report dated 4 April 2010 which was produced as exh 'AJ8' in the first plaintiff's affidavit in support. Upon this DNA report, new birth certificates (exhs 'AJ1' and 'AJ2') had been issued with the necessary changes for the two infants. The defendant opposed this application primarily relying on the grounds as deposed in the affidavit in opposition that the first plaintiff is the defendant's lawful wife vide their marriage solemnised according to 'Adat Istiadat Kampung' on 25 October 2003 with a certificate issued by the 'Ketua Anak Negeri'. Pitas (exh 'JJ1' in affidavit in opposition) ('the first marriage') and thus the two infants are presumed to be the defendant's children as they were born during the subsistence of his marriage with the first plaintiff. Secondly, it was contended that the subsequent marriage between the first and the second plaintiffs pursuant to the Law Reform (Marriage and Divorce) Act 1976 on 2 November 2010 ('the second marriage') in the subsistence of the defendant's said marriage with the first plaintiff, is null and void and that the plaintiffs have committed bigamy under s 7 of the Law Reform (Marriage and Divorce) Act 1976.

ISSUES RELEVANT FOR DETERMINATION BY THE COURT

[3] The principal remedy sought by the plaintiffs herein is a declaration that the defendant is not the natural and/or the adopted father on ground that the DNA report has verified and confirmed that both the plaintiffs were and are the biological parents of the two infants. The defendant's claim of his parenthood is upon reliance on the presumption under s 112 of the Evidence Act 1950 ('the EA') which had previously been decided by His Lordship Clement Skinner J (as he then was) in OS K24–199 of 2008-II which His Lordship held that the first marriage between the defendant and the first plaintiff was valid and in consequence thereof, under s 112 of the EA, it shall be conclusive proof that the two infants were the lawful or legitimate children born of the first marriage. It must be noted that at the material time of that trial, there were no DNA tests and DNA report as to the biological paternity of the two infants. Since the issue of the first marriage had been decided, it would be res judicata for such issue to be relitigated by this court; see *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 (SC). Consequently, in the light of the remedy sought, there is no relevancy of the issue of validity of the marriage to be decided, so is the question of bigamy and this court finds that the sole issue for determination is whether the plaintiffs have now rebutted or disproved the presumption under s 112 of the EA on the paternity of the defendant as the natural and biological father of the two infants. On the declaration sought that the defendant is also not the adopted father of the two infants, I find this to be non-issue as there is no

evidence of any adoption order made under the Adoption Ordinance 1960 being produced before this court.

FINDINGS OF THE COURT

[4] On the paternity of the two infants whether the defendant is the biological and the natural father of them, the provision under s 112 of the EA is clearly a rebuttable presumption particularly so when it also provides that 'unless it can be shown that the parties to the marriage had no access to each other at any time when he (the Defendant) could have been begotten'. For ease of reference s 112 of the EA provides:

> 112 The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

[5] Presumption is not the actual fact or the truth but something assumed. When true fact exists, it will be unjust for this court to ignore it or to deprecate the scientific mode which can achieve certainty in the subject matter in issue. To cling on to the legal presumption under s 112 of the EA in the light of the true fact is against the principle of justice which would demand that the court shall accept the truth and not a presumed truth. Since the defendant's case is hinged on the rebuttable presumption under s 112 of the EA, I am of the view that the issue of paternity of the two infants is still a live issue if there is rebuttal evidence from the plaintiffs. Therefore, I am of the view that res judicata does not apply on this issue of paternity by estopping the plaintiffs from raising new, cogent and material evidence which will rebut the presumption under s 112 of the EA. This is particularly so when there was no DNA test performed earlier and no such DNA results were available in the earlier trial as to the truth of the paternity of the two infants. The defendant has cited the Indian High Court authority of *Gautam Kundu v State of West Bengal and SM* (1992) 2 CALLT 130 HC pertaining to s 112 of the Indian Evidence Act which is pari materia with our s 112, which held, inter alia, that:

> Therefore, if it is proved that there was marriage between the parties and the child was born during the continuance of that marriage it becomes a conclusive proof that the child is the legitimate child of the husband and no evidence, be it in the form of a scientific device like blood group test or otherwise, can be allowed to be given to disprove that the husband is the father of the child except in the manner as particularly provided in s 112.

[6] I do not think that I can agree with the above observation on the interpretation of s 112 of the EA as to the part that 'no evidence, be it in the form of a scientific device like blood group test or otherwise, can be allowed ...'

in the light of the accuracy and certainty of a DNA test in the present era which has been universally recognised and accepted as conclusive evidence of its result in the test be it, inter alia, the paternity, motherhood or both or others. I do not accede to the proposition that such DNA test and its result which has been universally recognised as accurate to the extent of achieving certainty though being a form of scientific means ought to be disallowed as evidence to rebut the presumption under s 112 of the EA. The court must not shut its eyes on the truth of the matter in issue. It must be noted that when the above decision was made more than 20 years ago, perhaps, DNA test was yet to be universally recognised and blood grouping test was non-conclusive proof of certainty of paternity. Today, DNA test is well accepted as to its accuracy. I find no valid reason to depart from this aspect of the science which gives an accurate result of 99.99% of certainty unless there is another report to the contrary. The DNA report which virtually ascertains the truth of the fact in issue ought to be accepted by this court. If it can be established by this DNA test with that positive certainty of the biological parenthood of the two infants, I am of the view that it would not only have affirmed that the first defendant being a party to the first marriage might 'have no access to each other at any time when he (the Defendant) could have been begotten' but would also have provided affirmative and conclusive rebuttal evidence to the presumption that the two infants were the legitimate children of the defendant biologically.

[7] The DNA test carried out by the Chemistry Department of Malaysia leading to the DNA report as exhibited in the affidavit of the first plaintiff (exh 'AJ8') shows the following:

> On comparison of the DNA profile obtained, I found that the donor of the blood specimen 'F' (labeled 'Chua Kin Han 790715-14-5633) is the biological father of the donor of blood specimen 'C1' (labeled 'Finnea Alesiah Julas', 041125-12-1608) and 'C2' (labeled 'Nuerial Julas', 070105-12-0927) given that the biological mother is represented by blood specimen 'M' (labeled 'Alesiah Binti Jumil', 821025-12-5618). The probability of paternity is 99.99% as calculated based on the Malaysian Malay, Chinese and Indian population database.

[8] This DNA report from the Chemistry Department Malaysia has expressed that 'the probability of paternity is 99.99%' based on the database of the Malaysian Malay, Chinese and Indian population which I find undoubtedly to be a conclusive proof that the second plaintiff being a Malaysian Chinese is affirmed to be the biological father of the two infants vide the said DNA test or verification. The defendant on the other hand has not tendered any DNA report relating to himself and the two infants or any DNA report contrary to the plaintiffs' DNA report (exh 'AJ8'). This court must therefore accept exh 'AJ8' which is from an independent body namely the Chemistry Department of Malaysia and its contents as true since the defendant had led no fact or evidence in his affidavits to refute or contradict this fact as

found by the Chemistry Department Malaysia; see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 CLJ 609 (CA). The reliance on the presumption by the defendant under s 112 of the EA 1950 in his contention would therefore have no consequence or no effect as, to reiterate, s 112 of the EA is a rebuttable presumption and in the absence of anything to the contrary, I hold that the DNA test and the DNA report exh 'AJ8' with its conclusive finding that the second plaintiff is the biological father of the two infants, have successfully rebutted the said presumption under s 112 of the EA that the defendant could be the biological father of the two infants.

[9] The first plaintiff vide her evidence in support of this application stated vividly that she and the defendant although married did not consummate as 'husband and wife' because the defendant was impotent and that the defendant had no time for the first plaintiff as the defendant was busy with his other family (with his first wife Liau Yen Fah whom the defendant had not divorced when he married again with the first plaintiff) and his work. This fact is nevertheless uncontradicted, unchallenged and unrebutted by the defendant who did not even deny the stated fact that he was impotent and his alleged marriage with the first plaintiff was not consummated. There was also no medical evidence being produced by the defendant showing his potency which the defendant would and should have no difficulty to obtain but had failed to do so. The defendant submitted that the second plaintiff has not denied the access between the defendant and the first plaintiff. I find this to be devoid of merit with the undisputed fact from the first plaintiff that the defendant was impotent and their marriage was not consummated. Hence, whether the second plaintiff denies or otherwise of the defendant's access with the first plaintiff would not have reversed the fact that the defendant has not consummated the first marriage. On account of this failure by the defendant in his onus to challenge and/or contradict this material fact as deposed by the first plaintiff, pursuant to ss 102 and 103 of the EA, it tantamount to an admission by the defendant of this fact so asserted; see *Ng Hee Thoong & Anor v Public Bank Bhd*. This undisputed but deemed admitted fact by the defendant would have further negated the presumption that the defendant could be the biological father of the two infants during the subsistence of the first marriage. With the existence of the DNA report coupled with the undisputed and uncontradicted fact as deposed by the first plaintiff above, I am satisfied that the plaintiffs have adduced sufficient and material evidence or proof to conclusively rebut the presumption under s 112 of the EA and I am also satisfied that from the proof produced before this court that the defendant could not have been and is not the natural or biological father of the two infants but that it is the second plaintiff who is proved and confirmed to be the biological father of the two infants and I must so hold in favour of the plaintiffs.

[10] Reverting to the defendant's contention of bigamy allegedly committed by the first plaintiff with the second plaintiff in the light of the validity of the first marriage, to this court and to reiterate, it is irrelevant to the issue in this application for simple reason that whether there is such allegation of bigamy being established or otherwise, it does not affect the issue of paternity which is the sole issue and which has been affirmatively proved by the DNA report alone that it is the second plaintiff who is the biological father of the two infants thereby positively rebutted the legal presumption under s 112 of the EA that the defendant could be the biological father of them. Consequently, I find no necessity to consider this contention/allegation of bigamy by the defendant at this stage and would leave it for determination when such allegation/contention becomes the issue relevant to the cause of action.

[11] Having considered all evidence relevant and the submissions by both parties and for the foregoing reasons, I allow this application vide encl 1 prayers 1–2 with agreed costs of RM5,000.

Application allowed with costs of RM5,000.

Reported by Afiq Mohamad Noor